

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT BECKLEY**

**MICHAEL D. ROSE,**  
and **EDWARD L. HARMON,**  
*on their own behalf and on behalf  
of all others similarly situated,*

**Plaintiffs,**

**v.**

**Civil Action No. 5:22-cv-00405**

**MICHAEL FRANCIS,**  
*individually and as an employee of  
the West Virginia Division of Corrections  
and Rehabilitation,*  
**THE RALEIGH COUNTY COMMISSION,**  
*John/Jane Doe Employees of the Raleigh  
County Commission,*  
**THE FAYETTE COUNTY COMMISSION,**  
*John/Jane Doe Employees of the Fayette  
County Commission,*  
**THE GREENBRIER COUNTY COMMISSION,**  
*John/Jane Doe Employees of the Greenbrier  
County Commission,*  
**THE MERCER COUNTY COMMISSION,**  
*John/Jane Doe Employees of the Mercer  
County Commission,*  
**THE MONROE COUNTY COMMISSION,**  
*John/Jane Doe Employees of the Monroe  
County Commission,*  
**THE SUMMERS COUNTY COMMISSION,**  
*John/Jane Doe Employees of the Summers  
County Commission,*  
**THE WYOMING COUNTY COMMISSION,**  
*John/Jane Doe Employees of the Wyoming  
County Commission,*  
**PRIMECARE MEDICAL OF WEST VIRGINIA, INC.,**  
*John/Jane Doe PrimeCare Employees,*  
**JOHN/JANE DOE CORRECTIONAL OFFICERS,**  
**BETSY JIVIDEN,** *individually as an employee of the  
West Virginia Division of Corrections and Rehabilitation,*  
**WEXFORD HEALTH SOURCES, INC.**  
*John/Jane Doe Wexford Employees,*  
**BRAD DOUGLAS,** *individually and in his official  
capacity as the acting Commissioner of the West  
Virginia Division of Corrections and Rehabilitation,*

**JEFF S. SANDY**, *individually and in his official capacity as the Cabinet Secretary of the West Virginia Division Department of Homeland Security, and*  
**WILLIAM K. MARSHALL, III**  
*individually and in his official capacity as the Commissioner of the West Virginia Division of Corrections and Rehabilitation,*

**Defendants.**

**MEMORANDUM OF LAW IN SUPPORT OF  
PRIMECARE MEDICAL OF WEST VIRGINIA, INC.’S  
MOTION FOR RELIEF FROM MEMORANDUM & ORDER  
DENYING, WITHOUT PREJUDICE, ITS MOTION TO DISMISS  
SECOND AMENDED CLASS ACTION COMPLAINT [ECF 908]**

COMES NOW, PrimeCare Medical of West Virginia Inc., (“PrimeCare”) by counsel, Mark R. Simonton, Anne Liles O’Hare, Alex S. Blevins and the law firm of Offutt Simmons Simonton, PLLC and, pursuant to Federal Rule of Procedure 60(b)(6), hereby moves the Court for relief from its Memorandum & Order, which denied without prejudice the Joint Motion to Dismiss Second Amended Class Action Complaint, as to PrimeCare alone [ECF 908 n.1]. In support thereof, PrimeCare contemporaneously files its Memorandum of law.

**I. FACTUAL AND PROCEDURAL HISTORY**

On July 31, 2023, all Defendants filed a Joint Motion to Dismiss Second Amended Class Action Complaint [ECF. 483, 484]. Plaintiffs responded to the Joint Motion to Dismiss on August 29, 2023, [ECF. 585], to which all Defendants jointly replied on August 29, 2023, [ECF 588]. On March 13, 2024, this Court entered a Memorandum Opinion & Order [ECF 908] in which it granted in part the Defendants’ Joint Motion to Dismiss Second Amended Complaint [ECF.433]. Specifically, as to the County Defendants, the Court dismissed with prejudice Counts III, VI, VIII, IX,

X, XI and XII. With respect to Defendant Wexford, the Court dismissed without prejudice Counts VIII through XII. Also, the entirety of Plaintiffs' Section 1983 claims against Defendant Wexford were dismissed without prejudice. [ECF 908].

The Court further ruled that all the dismissed claims could be lodged anew via an amended pleading filed on or before March 20, 2020, along with the supporting explanation as to the claims against the County Defendants. [ECF 908]

The Court added a footnote to the Memorandum Opinion & Order regarding PrimeCare Medical of West Virginia, Inc.:

On January 17, 2024, Defendant PrimeCare Medical of West Virginia, Inc. ("PrimeCare"), petitioned for relief under Chapter 7 of the United States Bankruptcy Code. In compliance with 11 U.S.C. § 362, all proceedings against PrimeCare are stayed and, as more fully reflected within, all motions pending and filed by PrimeCare – or to which it is a party—are, respectively, **DENIED** without prejudice in their entirety or as to PrimeCare alone. [ECF 908 n.1]

After the Court's Memorandum & Opinion was entered, an Agreed Order Granting the Motion of West Virginia Litigation Claimants for Relief From the Automatic Stay was entered by the United States Bankruptcy Court, Southern District of West Virginia on May 3, 2024. See May 3, 2024 order at **Exhibit 1**. A Final Decree Closing Case was entered by that Court on May 17, 2024. See May 17, 2024 order at **Exhibit 2**.

## **II. LEGAL STANDARD**

Rule 60 (b) (6) of the Federal Rules of Civil Procedure provides:

**(6) Grounds for Relief from a Final Judgment, Order or Proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59 (b);
- (3) Fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has not been satisfied, released or discharged; it is based on an earlier judgment that has been removed or vacated; or applying it prospectively is no longer equitable;
- (6) any other reason that justifies relief.

### III. ARGUMENT

The Court’s denial of PrimeCare’s portion of the Joint Motion to Dismiss Second Amended Class Action Complaint [ECF 483, 484] was without prejudice, due to the stay imposed by 11 U.S.C. §362. That stay has now been lifted and PrimeCare’s Chapter 7 bankruptcy case has been closed, therefore, the stated reason for the Court’s denial without prejudice of PrimeCare’s portion of the Joint Motion to Dismiss Second Amended Class Action Complaint no longer exists. This falls clearly within the provision of Rule 60(b)(6) as an “other reason that justifies relief.”

The Supreme Court has consistently held that Rule 60(b)(6) motions should be granted only in “extraordinary circumstances” *Ackerman v. United States*, 340 U.S. 193, 199, 71 S.Ct.209, 95 L. Ed 207 (1950). The D.C. Circuit has similarly observed that Rule 60(b)(6) “should only be used sparingly” and may not “be employed simply to rescue a litigant from strategic choices that later turn out to be improvident.” *Kramer v. Gates*, 481 F.3d 788, 792, 375 U.S. App. D.C. 292 (D.C. Cir. 2007), quoting *Good Luck Nursing Home, Inc. v. Harris*, 636 F.2d 572, 577, 204 U.S. App. D.C. 300 (D.C. Cir. 1980.) However, this catchall provision has been interpreted to apply when

a party demonstrates “extraordinary circumstances” *Marino v. Drug Enforcement Admin.* 685 F.3d 1076,1079, 401 U.S. App. D.C.452 (D.C. Cir.212).

Such an extraordinary circumstance exists in the present case, wherein the PrimeCare’s Chapter 7 bankruptcy case has been closed, the stay has been lifted and the Court no longer has an impediment to ruling on PrimeCare’s portion of Joint Motion to Dismiss Second Amended Class Action Complaint, [ECF 908 n.1].

#### IV. CONCLUSION

Wherefore, for the reasons set forth above, PrimeCare Medical Of West Virginia, Inc. requests that the Court grant its relief from the Memorandum & Order which denied without prejudice the Joint Motion to Dismiss Second Amended Class Action Complaint, as to PrimeCare alone [ECF 908 n.1].

Respectfully submitted,

PRIMECARE MEDICAL OF  
WEST VIRGINIA, INC.,

By Counsel,

/s/ Anne Liles O’Hare

Mark R. Simonton, Esquire (WV # 13049)

Anne Liles O’Hare, Esquire (WV # 9171)

Alex S. Blevins, Esquire (WV # 14047)

**Offutt Simmons Simonton, PLLC**

949 Third Avenue, Suite 300

P.O. Box 2868

Huntington, WV 25728-2868

(304) 529-2868 - Phone

(304) 529-2999 - Facsimile

[mrsimonton@offutlegal.com](mailto:mrsimonton@offutlegal.com)

[alohare@offutlegal.com](mailto:alohare@offutlegal.com)

[asblevins@offutlegal.com](mailto:asblevins@offutlegal.com)

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**WILLIAM K. MARSHALL, III**  
*individually and in his official capacity as the Commissioner of the West Virginia Division of Corrections and Rehabilitation,*

**Defendants.**

**CERTIFICATE OF SERVICE**

The undersigned counsel hereby certify that, on the **19<sup>th</sup>** day of **June, 2024**, I served the foregoing **MEMORANDUM OF LAW IN SUPPORT OF PRIMECARE MEDICAL OF WEST VIRGINIA, INC.'S MOTION FOR RELIEF FROM MEMORANDUM & ORDER DENYING, WITHOUT PREJUDICE, ITS MOTION TO DISMISS SECOND AMENDED CLASS ACTION COMPLAINT [ECF 908]**, via the Courts electronic filing system to the following:

Stephen P. New, Esquire  
Russell A. Williams, Esquire  
*New, Taylor & Associates*  
430 Harper Park Drive  
Beckley, WV 25801

Timothy Lupardus, Esquire  
*The Lupardus Law Office*  
275 Bearhole Road  
Pineville, WV 24874

Zachary Whitten, Esquire  
*Whitten Law Office, L.C.*  
P.O. Box 753  
Pineville, WV 24874

Robert Dunlap, Esquire  
*Robert Dunlap & Associates*  
208 Main Street  
Beckley, WV 25801

Chip E. Williams, Esquire  
Jared C. Underwood, Esquire  
*Pullin, Fowler, Flanagan,  
Brown & Poe, PLLC*  
252 George Street  
Beckley, WV 25801  
*Counsel for Michael Francis*

Jordan K. Herrick, Esquire  
David E. Schumacher, Esquire  
*Bailey & Wyant, PLLC*  
500 Virginia St. E., Suite 600  
Charleston, WV 25337-3710  
*Counsel for Wexford Health Sources, Inc.*

Michael D. Mullins, Esquire  
Peter J. Raupp, Esquire  
*Steptoe & Johnson, PLLC*  
Chase Tower, 17<sup>th</sup> Floor  
P.O. Box 1588  
Charleston, WV 25326-1588  
*Counsel for Brad Douglas, Betsey Jividen  
and Jeff S. Sandy, William K. Marshall*

Wendy E. Greve, Esquire  
Benjamin B. Vanston, Esquire  
*Pullin, Fowler, Flanagan,  
Brown & Poe, PLLC*  
901 Quarrier Street  
Charleston, WV 25301  
*Counsel for Greenbrier County Commission,  
Mercer County Commission, Monroe County  
Commission, Summers County  
Commission, Wyoming County Commission*

Michael W. Taylor, Esquire  
Harrison M. Cyrus, Esquire  
*Bailey & Wyant, PLLC*  
*500 Virginia Street, East, Suite 600*  
P.O. Box 3710  
Charleston, WV 25337-3710  
*Counsel for Fayette County Commission*

Charles R. Bailey, Esquire  
Harrison M. Cyrus, Esquire  
*Bailey & Wyant, PLLC*  
*500 Virginia Street, East, Suite 600*  
P.O. Box 3710  
Charleston, WV 25337-3710  
*Counsel for Larry Warden*

J. Victor Flanagan, Esquire  
Daniel J. Burns, Esquire  
*Pullin, Fowler, Flanagan,*  
*Brown & Poe, PLLC*  
252 George Street  
Beckley, WV 25801  
*Counsel for Raleigh County Commission*

Amanda J. Taylor, Esquire  
*Taylor, Hinkle & Taylor*  
115 ½ S. Kanawha Street  
Beckley, WV 25801  
*Counsel for Plaintiff*

/s/ Anne Liles O'Hare

Anne Liles O'Hare, Esquire (WV # 9171)